[redacted]
[redacted], MI [redacted]

Date Mailed: January 31, 2022
MOAHR Docket No.: 20-002269, 20-002270, 20-003014, 20-003015, 20-003609, 20-007297; 20-007298; 20-007876; 20-007877; 21-000694; 21-000695
Agency No.: [redacted]
Petitioner: [redacted]

**ADMINISTRATIVE LAW JUDGE: Robert J. Meade**

## DECISION AND ORDER

These matters are before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9, 42 CFR 431.200 *et seq.,* and 42 CFR 438.400 *et seq* upon Petitioners' requests for hearing. The following matters were consolidated with permission of the parties: 20-002269-CMH, 20-002270-CMH, 20-003014-EDW, 20-003015-EDW, 20-003609-EDW, 20-007297-CMH; 20-007298-CMH; 20-007876-CMH; 20-007877-CMH; 21-000694-EDW; 21-000695-EDW.

On July 13, 2020, an Order consolidating most of the above cases was issued and a hearing was scheduled for August 13, 2020. On July 30, 2020, an Order adjourning the hearing was issued as the parties decided to pursue mediation. Docket numbers 21-000694-EDW and 21-000695-EDW were later consolidated. In July 2021, the parties notified the undersigned ALJ that mediation was not successful, and a status conference was held on August 12, 2021. A prehearing conference was then held on October 26, 2021, and a hearing was scheduled for November 16, 2021. The November 16, 2021 hearing was adjourned per Petitioners' request and rescheduled for January 27, 2022. The January 27, 2022 hearing proceeded as scheduled.

Attorney Craig W. Elhart appeared on behalf of Petitioners [redacted], Petitioners' mother/guardian and Deb Hemgesberg, LMSW appeared as witnesses for Petitioner.

Attorney P. David Vinocur appeared on behalf of Respondent, Northern Lakes Community Mental Health (CMH, NLCMH or Respondent).

Attorney Leslie Dickinson appeared on behalf of Respondent, Area Agency on Aging of Northwest Michigan (AAA of NWMI or Waiver Agency).

Assistant Attorney General Stephanie Service appeared on behalf of non-party, Michigan Department of Health and Human Services (MDHHS). Elizabeth Gallagher,

Manager, Home and Community Based Services appeared as a witness for the Department.

Petitioners' Exhibits A-P were accepted into the record.

Respondent AAA of NWMI's Exhibits A-H were accepted into the record.

Respondent NLCMH did not submit any Exhibits.

On January 25, 2022, Petitioners' mother/guardian filed an additional Exhibit and requested that a second hearing date be scheduled to address additional issues that arose since the original hearing requests were filed. Petitioners' attorney was advised at the hearing that these issues would need to be put into a new request for hearing and filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

## ISSUE

The parties stipulated to the following issues on appeal:

**Issue 1.** Does enrollment in the MI Choice Waiver preclude a beneficiary from simultaneously receiving Medicaid services (including, but not limited to, person centered planning, case management, family counseling, speech therapy, occupational therapy, physical therapy, dietary services and enhanced pharmacy) through a CMHSP?

**Issue 2.** If not precluded, is a MI Choice Waiver enrollee eligible to receive CMHSP services that could also be provided by the MI Choice Waiver agent such as person-centered planning, case management and community living supports?

**Issue 3.** When a beneficiary is enrolled in three separate Medicaid programs (MI Choice Waiver, CMHSP and Medicaid health services), which program is the payor of last resort as to any specific goods and services requested by the enrollee if the goods and services are medically necessary and available under more than one program?

**Issue 4.** Are any of the following services covered under the MI Choice Waiver?

- Speech, Occupational and Physical Therapy
- Family Counseling
- Enhanced Pharmacy
- Dietary Services
- Environmental Services

## FINDINGS OF FACT

The parties stipulated to the following Findings of Fact:

1. [redacted] and [redacted] are young adults who reside in an apartment in the Guardian's home. They are both severely handicapped and require a nursing home level of care. They are currently enrolled in MI Choice Waiver. They also receive Medicaid services through Northern Lakes Community Mental Health Authority (a CMHSP) and the Medical Services Administration (MSA). They are privately insured by Priority Health. At the time of these appeals they were privately insured by Blue Cross/Blue Shield of Michigan.

2. The CMHSP waiver under which the CMHSP operates provides that a person may be enrolled in only one Medicaid waiver program while the MI Choice Waiver contract (also issued by the MSA) indicates that a person may be enrolled in more than one Medicaid waiver program and participants must coordinate with non-Home and Community-Based CMHSP services. This appears to be conflicting MDHHS policy.

3. Petitioners' requests for hearing were received by MOAHR on various dates.

## CONCLUSIONS OF LAW

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations (CFR). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.
>
> *42 CFR 430.0*
>
> The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains

> all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.
>
> *42 CFR 430.10*

Section 1915(b) of the Social Security Act provides:

> The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State…

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Health and Human Services (MDHHS) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with the Michigan Department of Health and Human Services to provide services under the waiver pursuant to its contract obligations with the Department.

Medicaid beneficiaries are entitled to medically necessary Medicaid covered services for which they are eligible. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. *See 42 CFR 440.230.*

These Petitioners are also receiving services through the Department's Home and Community Based Services for Elderly and Disabled (HCBS/ED). The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid (formerly HCFA) to the Michigan Department of Health and Human Services (Department). Regional agencies function as the Department's administrative agency.

> Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program. Detailed rules for waivers are set forth in subpart B of part 431, subpart A of part 440 and subpart G of part 441 of this chapter. *42 CFR 430.25(b)*

A waiver under section 1915(c) of the [Social Security] Act allows a State to include as "medical assistance" under its plan, home and community-based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/IID [Intermediate Care Facility/Individuals with Intellectual Disabilities] and is reimbursable under the State Plan. *42 CFR 430.25(c)(2)*

**Issue 1.** Does enrollment in the MI Choice Waiver preclude a beneficiary from simultaneously receiving Medicaid services (including, but not limited to, person centered planning, case management, family counseling, speech therapy, occupational therapy, physical therapy, dietary services and enhanced pharmacy) through a CMHSP?

Respondent NLCMH argues that enrollment in the MI Choice Waiver does preclude a beneficiary from simultaneously receiving Medicaid services through a CMHSP, except in very unusual circumstances. In support, Respondent NLCMH relies on policy found in the Medicaid Provider Manual, MI Choice Waiver Chapter, Section 4.2, which provides:

> **4.2 STATE PLAN SERVICES**
>
> MI Choice services are designed to address the unique needs and circumstances of program participants. Some waiver services appear to be the same as services offered in the State Plan; however, they differ in terms of key elements, such as scope of coverage or provider qualifications. Inasmuch as waiver services are designed to meet the specific demands of participants, it is expected that a waiver service will be more appropriate for a participant than a similar State Plan service. Under no circumstances shall the participant receive both services. Waiver agencies cannot authorize payment for services that are offered under the State Plan.
>
> *January 1, 2020, p 25*
> *Emphasis added*

Respondent NLCMH argues that none of the unusual circumstances are present here and that all of Petitioners' services should be covered by Respondent AAA of NWMI or by Petitioners' health plan.

Respondent AAA of NWMI argues that enrollment in the MI Choice Waiver does not preclude a beneficiary from simultaneously receiving Medicaid services through a CMHSP. In support, AAA of NWMI relies on policy found in the Medicaid Provider Manual, MI Choice Waiver Chapter, Section 2.2.A, which provides:

**2.2.A. FREEDOM OF CHOICE**

> Prior to MI Choice enrollment, all applicants and their legal representatives must be given information regarding all Medicaid long-term services and supports options for which they qualify through the nursing facility LOCD, including MI Choice, Nursing Facility, MI Health Link, and the Program of All-Inclusive Care for the Elderly (PACE). Qualified applicants may only enroll in one long-term services and supports program at any given time. Nursing facility, PACE, MI Choice, MI Health Link, and Adult Home Help services cannot be chosen in combination with each other. Applicants must indicate their choice, subject to the provisions of the Need for MI Choice Services subsection of this chapter, and document via their signature and date that they have been informed of their options via the Freedom of Choice (FOC) form that is provided to an applicant at the conclusion of any LOCD process. Applicants must also be informed of other service options that do not require Nursing Facility Level of Care, including Home Health and Home Help State Plan services, as well as other local public and private service entities. The FOC form must be signed and dated by the supports coordinator and the applicant (or their legal representative) seeking services and is to be maintained in the applicant's case record and provided to the applicant or participant upon request.
>
> *July 1, 2021, p 3*
> *Emphasis added*

Respondent AAA of NWMI argues that, while the above policy does preclude enrollment in another long-term care *waiver*, it specifically does not preclude enrollment in a Community Mental Health Services Program, such as Respondent NLCMH. As such, Respondent AAA of NWMI argues that Petitioners should therefore be able to access services not covered through the MI Choice Waiver through NLCMH.

Petitioners argue that enrollment in the MI Choice Waiver does not preclude a beneficiary from simultaneously receiving Medicaid services through a CMHSP. In support, Petitioners point to a December 19, 2014 Memorandum from MDHHS to all CMHSP and MI Choice Directors regarding coordinating services between CMH and MI Choice. (P's Exhibit A.) The memorandum includes a six-page Coordination Guide and states, in pertinent part:

> The Michigan Department of Community Health has developed a guide for MI Choice Waiver Agencies and Community Mental Health (CMH) Agencies to use to determine when and if they should coordinate services for an individual. In most circumstances, individuals should receive services from either the MI Choice waiver or a CMH. However, it is not uncommon that an individual has issues that require the person to receive a combination of services from both entities. The intent of this guide is to assist staff with determining the extent to which services should be

> coordinated for an individual. Since no two situations are the same, this guide will not address every possible situation. MI Choice and CMH staffs need to use professional judgment, the individual's preferences, and most importantly, good communication skills, to determine the set of supports and services that will best meet the individual's needs.
>
> Emphasis added.

Having considered the parties arguments in full, it is determined that enrollment in the MI Choice Waiver does not preclude a beneficiary from simultaneously receiving Medicaid services through a CMHSP. As indicated above, while Section 4.2 of the MPM does indicate that services through the MI Choice Waiver will usually be more appropriate for a participant than a similar State Plan service, Section 2.2.A does not specifically exclude CMHSP's from providing services at the same time. And the December 19, 2014 Memorandum from MDHHS clearly indicates that there will be some circumstances where an individual will need to receive a combination of services from both entities. Finally, the Department's witness testified at the hearing that being enrolled in the MI Choice Waiver does preclude receiving services through a CMHSP.

**Issue 2.** If not precluded, is a MI Choice Waiver enrollee eligible to receive CMHSP services that could also be provided by the MI Choice Waiver agent such as person-centered planning, case management and community living supports?

Respondent NLCMH argues, consistent with its argument for Issue 1, that a MI Choice Waiver enrollee would not be eligible to receive CMHSP services that also could be provided by the MI Choice Waiver. Respondent NLCMH argues that such services would be the exclusive responsibility of the MI Choice Waiver in instances where both programs offer the same services.

Respondent AAA of NWMI argues that while issues 1 through 3 may involve MDHHS policy considerations, answers to those issues are not necessary to resolve the pending appeals involving AAA of NWMI. Respondent AAA of NWMI argues that since the answer to Issue 4 is "No" for all requested services, that answer is dispositive as it relates to all appeals involving AAA of NWMI.

Petitioners argue that a MI Choice Waiver enrollee can be eligible to receive CMHSP services that are also being provided by the MI Choice Waiver if they are distinct and not duplicative. In support, Petitioners point to page 2 of the Coordination Guide attached to the December 14, 2014 Memorandum discussed above, which indicates that the services must be negotiated between the two agencies and the agencies may split some services if they agree. Petitioners also argue that Person Centered Planning, Case Management and Supports Coordination, and CLS may be provided by both agencies under some circumstances.

Having considered the parties arguments in full, it is determined that a MI Choice Waiver enrollee is eligible to receive some CMHSP services that could also be provided by the MI Choice Waiver agent. As indicated in Issue 1 above, being enrolled in the MI

Choice Waiver does not preclude a beneficiary from receiving services through a CMHSP. Regarding the specific services at issue, if a Petitioner receives any services through a CMHSP, the CMHSP must participate in the Person-Centered Planning process as that process is the only way for a CMHSP to authorize services. As Petitioners point out, Person-Centered Planning is not a service, it is a method used to determine needed services.

Regarding case management and supports coordination, those services should mostly be covered by the MI Choice Waiver agency, but there could be some limited case management services needed at the CMHSP. The services Petitioner receives through the CMHSP will need to be managed by someone and, as Petitioners point out, those services cannot be managed by the MI Choice Waiver agency. As indicated in page 2 of the Coordination Guide, "Typically, an individual only accesses support coordination or case management services from one program unless the nature of those services are distinct and non-duplicative." (P's Exhibit A)

Regarding CLS, the MI Choice Waiver agency should provide all CLS Petitioners need and are eligible for. While the Coordination Guide does discuss the coordination of CLS and Personal Care Services through Home Help Services, it does not contemplate a CMHSP providing CLS to an individual enrolled in the MI Choice Waiver. The Department's witness also testified at the hearing that CLS should be provided entirely through the MI Choice Waiver. The undersigned understands that AAA of NWMI is to assess Petitioners' need for CLS while hospitalized to see if the health and safety exception in the HCBS Chapter applies and negates the prohibition of CLS while hospitalized found in the MPM, MI Choice Chapter, Section 3.1.B.

**Issue 3.** When a beneficiary is enrolled in three separate Medicaid programs (MI Choice Waiver, CMHSP and Medicaid health services), which program is the payor of last resort as to any specific goods and services requested by the enrollee if the goods and services are medically necessary and available under more than one program?

Respondent NLCMH argues that there is a dearth of information on setting priorities for payment among multiple Medicaid providers. Respondent NLCMH points out that such a dispute is an element of most of the Medicaid appeals filed by Petitioners over the last few years. Respondent NLCMH argues that because many of the items are medical supplies, such as disposable laryngectomy tubes and latex gloves, they should be covered by Petitioners' health plan, not the CMHSP. Respondent NLCMH argues that the need for such items is a direct consequence of Petitioners' fragile post-surgical medical condition, not their developmental disabilities.

Respondent AAA of NWMI repeats its argument from Issue 2 above and argues that the answer to Issue 4 is dispositive as it relates to all appeals involving AAA of NWMI.

Petitioners argue that all parties agree that Medicaid (*i.e.,* State Plan or a Medicaid Health Plan) is the first payor and that both agencies must obtain a denial from Medicaid before they cover a service. However, Petitioners argue that after such a denial is received from Medicaid, both the MI Choice Waiver and the CMHSP are

equally liable as payors of last resort and must negotiate which agency is to cover which service. Petitioners argue that the Coordination Guide gives clear direction on which agency should cover some services but also indicates that the agencies must negotiate which agency will cover similar services. Petitioners point out that the parties did negotiate such an agreement back in 2018 but the agencies (particularly NLCMH) have refused to negotiate since that time.

Having considered the parties arguments in full, it is determined that the order of payment is Medicaid (*i.e.*, State Plan or Medicaid Health Plan), MI Choice Waiver, then CMHSP[1]. When Petitioners joined the MI Choice Waiver in 2018, the Waiver became primarily responsible for Petitioners' needs. Except as discussed above (case management, *etc.*), CMHSP should only be paying for services that are not covered by either Medicaid or the MI Choice Waiver. This is consistent with both the Coordination Guide discussed above and testimony from the Department's witness. (More specificity as to who should pay for what is found under Issue 4 below).

**Issue 4.** Are any of the following services covered under the MI Choice Waiver?

- Speech, Occupational and Physical Therapy
- Family Counseling
- Enhanced Pharmacy
- Dietary Services
- Environmental Services

Respondent NLCMH argues that Speech, Occupational and Physical Therapy should be covered by Petitioners' health plan. Respondent NLCMH also noted that it had arranged for an evaluation for these services that concluded the therapies were not clinically appropriate for Petitioners. Respondent NLCMH argues that Family Counseling should be covered by the MI Choice Wavier, pursuant to MPM, MI Choice Waiver Chapter, Section 4.1.J. Respondent NLCMH argues that Enhanced Pharmacy items should be provided by Petitioners' health plan as these goods and services cannot contribute to achieving the goals of community inclusion, participation, independence and productivity. Respondent NLCMH argues that Dietary Services should be provided by the Petitioners' health plan as NLCMH does not have a dietician on its panel of providers. Respondent NLCMH argues that Environmental Services should be furnished by the MI Choice Waiver pursuant to MI Choice Waiver Chapter, Section 4.1.K.

Respondent AAA of NWMI argues that while Speech, Occupational, and Physical Therapy may be coordinated and provided at an Adult Day Center, Petitioners are not eligible for Adult Day Services due to the complexity of their needs. (R's Exhibits G and

[1] Of course, Petitioners' private health insurance is always primary and must be considered first.

H.) Respondent AAA of NWMI points out that while MI Choice can provide participant training from a physical therapist based on needs, the service of Physical Therapy is not included in the Minimum Operating Standards as an eligible service under the MI Choice program.

Regarding Family Counseling, Respondent AAA of NWMI argues that counseling services covered under the MI Choice Waiver are different from services offered through CMHSP. Respondent AAA of NWMI points out that the Minimum Operating Standards provide, "Where applicable, the participant must use Medicaid State Plan, Medicare, or other available payers first. This includes mental health treatment and therapy available through community mental health agencies. Under no circumstances does MI Choice counseling replace therapeutic treatments available through the local community mental health agency." (R's Exhibit G, p 36)(Emphasis added). Respondent AAA of NWMI also points to MPM, MI Choice Chapter, Section 4.1.F, which indicates:

> Counseling services seek to improve the participant's emotional and social well-being through the resolution of personal problems or through changes in a participant's social situation.
>
> Counseling services must be directed to participants who are experiencing emotional distress or a diminished ability to function. Family members, including children, spouses or other responsible relatives, may participate in the counseling session to address and resolve the problems experienced by the participant and to prevent future issues from arising. Counseling services are typically provided on a short-term basis to address issues such as adjusting to a disability, adjusting to community living, and maintaining or building family support for community living. Counseling services are not intended to address long-term behavioral or mental health needs.
>
> *July 1, 2021, p 14*
> *Emphasis added*

As such, Respondent AAA of NWMI argues that since MI Choice counseling is not intended to address long-term behavioral health issues, it cannot replace the therapeutic treatments available through the CMHSP. Respondent AAA of NWMI pointed out that Petitioners here asked for a blanket, generalized approval of all counseling/family services, which was denied as each request would require an individualized review, a review of other available resources and an eligibility determination. Respondent AAA of NWMI also points out that Petitioners requested "family therapy as it is described in B3 services", which would not be a covered service under the MI Choice Waiver.

Regarding Enhanced Pharmacy, Respondent AAA of NWMI argues that per the Minimum Operating Standards and the MPM, Enhanced Pharmacy services are not included as covered services under the MI Choice Waiver. (R's Exhibits G and H). Respondent AAA of NWMI argues that while specific medical supply items may be

covered under the category Specialized Medical Equipment and Supplies, those items would need to be assessed and evaluated on a per request, per occurrence basis. Respondent AAA of NWMI points out that here, Petitioners made a blanket, generalized request for approval of all supplies and medications, which was denied because each item requires individual review. Respondent AAA of NWMI also argues that it cannot cover herbal remedies or over-the-counter medications for uses not authorized by the FDA. Respondent AAA of NWMI also points out that Petitioners' requests cannot be filled under the category of Goods and Services because those services are only available to participants in the self-determination program. Petitioners do not participate in the self-determination program.

Regarding Dietary Services, Respondent AAA of NWMI argues that dietary services are not included as a covered service in the Minimum Operating Standards for the MI Choice Waiver program. (R's Exhibits G and H). Respondent AAA of NWMI points out that participants who receive home delivered meals have access to a dietician, but Petitioners here do not receive home delivered meals. (R's Exhibit H, pp 17-18)

Regarding Environmental Services, Respondent AAA of NWMI indicated that Environmental Accessibility Adaptations are a covered service under the MI Choice Waiver if the requests meet applicable policy. However, Respondent AAA of NWMI points out that Petitioners' requests here were for a blanket, generalized approval of all environmental services, so they were denied.

Petitioners argue that Speech, Occupational and Physical Therapy, as well as Family Counseling, Enhanced Pharmacy, and Dietary Services are not covered under the MI Choice Waiver for the same reasons stated in Respondent AAA of NWMI's brief. Petitioners argue that Speech, Occupational and Physical Therapy, as well as Family Counseling and Dietary Services are covered under CMHSP pursuant to MPM, Behavioral Health and Intellectual and Developmental Disability Supports and Services (BHIDDSS) Chapter, Sections 3.9, 3.10, 3.19, 3.22, and 3.23 respectively. Petitioners also argue that Enhanced Pharmacy and Environmental Services are listed as B-3 services covered by the CMHSP pursuant to MPM, BHIDDSS Chapter, Sections 17.3.c and 17.3.d respectively. Petitioners argue that NLCMH agreed in 2018 to cover these services but have since refused to cover the services and have offered no valid reason why. Regarding Family Counseling, Petitioners point out that the Coordination Guide specifically states on page 5 that "Persons receiving CMH therapy services should not also have MI Choice counseling services authorized. MI Choice counseling is NOT a replacement for CMH therapy." (P's Exhibit A, p 5).

Regarding Environmental Services, Petitioners argue that the Coordination Guide indicates that the policy for Environmental Modifications is very similar for both programs, so it would be up to the agencies to negotiate which agency covers Environmental Services and for the ALJ to decide if the agencies cannot agree.

Having considered the parties arguments in full, it is determined that Speech, Occupational and Physical Therapy, as well as Family Counseling, Enhanced Pharmacy, and Dietary Services are not covered under the MI Choice Waiver but are

covered services for a CMHSP such as NLCMH as outlined in the BHIDDSS Chapter of the MPM, which provides in pertinent part:

> **SECTION 3 – COVERED SERVICES**
>
> The Mental Health Specialty Services and Supports program is limited to the state plan services listed in this section, the services described in the Habilitation Supports Waiver for Persons with Developmental Disabilities Section of this chapter, and the additional/B3 services described in the Additional Mental Health Services (B3s) section of this chapter.
>
> ****
>
> **3.9 FAMILY THERAPY**
>
> Family Therapy is therapy for a beneficiary and family member(s), or other person(s) significant to the beneficiary, for the purpose of improving the beneficiary/family function. For children and youth, a family-driven, youth-guided planning process should be utilized. Family therapy does not include individual psychotherapy or family planning (e.g., birth control) counseling. Family therapy is provided by a mental health professional or limited licensed master's social worker supervised by a fully licensed master's social worker.
>
> **3.10 HEALTH SERVICES**
>
> Health Services are provided for purposes of improving the beneficiary's overall health and ability to care for health-related needs. This includes nursing services (on a per-visit basis, not on-going hourly care), dietary/nutritional services, maintenance of health and hygiene, teaching self-administration of medication, care of minor injuries or first aid, recognizing early symptoms of illness and teaching the beneficiary to seek assistance in case of emergencies. Health assessments are covered under the Assessments subsection above. A registered nurse, nurse practitioner, clinical nurse specialist, physician assistant, or dietician must provide these services, according to their scope of practice. Health services must be carefully coordinated with the beneficiary's health care plan so that the PIHP does not provide services that are the responsibility of the MHP.
>
> **3.12 INDIVIDUAL/GROUP THERAPY**
>
> Treatment activity designed to reduce maladaptive behaviors, maximize behavioral self-control, or restore normalized psychological functioning, reality orientation, remotivation, and emotional adjustment, thus enabling improved functioning and more appropriate interpersonal and social relationships. Evidence-based practices such as integrated dual disorder

treatment for co-occurring disorders (IDDT/COD) and dialectical behavior therapy (DBT) are included in this coverage. Individual/group therapy is performed by a mental health professional within their scope of practice or a limited licensed master's social worker supervised by a full licensed master's social worker.

## 3.19 OCCUPATIONAL THERAPY

### Evaluation

Physician/licensed physician assistant/family nurse practitioner/clinical nurse specialist prescribed activities provided by an occupational therapist licensed by the State of Michigan to determine the beneficiary's need for services and to recommend a course of treatment. An occupational therapy assistant may not complete evaluations.

### Therapy

It is anticipated that therapy will result in a functional improvement that is significant to the beneficiary's ability to perform daily living tasks appropriate to his chronological developmental or functional status. These functional improvements should be able to be achieved in a reasonable amount of time and should be durable (i.e., maintainable).

Therapy to make changes in components of function that do not have an impact on the beneficiary's ability to perform age-appropriate tasks is not covered.

Therapy must be skilled (requiring the skills, knowledge, and education of a licensed occupational therapist). Interventions that could be expected to be provided by another entity (e.g., teacher, registered nurse, licensed physical therapist, family member, or caregiver) would not be considered as a Medicaid cost under this coverage.

Services must be prescribed by a physician/licensed physician assistant/family nurse practitioner/clinical nurse specialist and may be provided on an individual or group basis by an occupational therapist or occupational therapy assistant, licensed by the State of Michigan or by an occupational therapy aide who has received on-the-job training. The occupational therapist must supervise and monitor the assistant's performance with continuous assessment of the beneficiary's progress, but on-site supervision of an assistant is not required. An aide performing an occupational therapy service must be directly supervised by a qualified occupational therapist who is on site. All documentation by an occupational therapy assistant or aide must be reviewed and signed by the appropriately credentialed supervising occupational therapist.

## 3.22 PHYSICAL THERAPY

### Evaluation

Physician/licensed physician's assistant-prescribed activities provided by a physical therapist currently licensed by the State of Michigan to determine the beneficiary's need for services and to recommend a course of treatment. A physical therapy assistant may not complete an evaluation.

### Therapy

It is anticipated that therapy will result in a functional improvement that is significant to the beneficiary's ability to perform daily living tasks appropriate to his chronological, developmental or functional status.

These functional improvements should be able to be achieved in a reasonable amount of time and should be durable (i.e., maintainable). Therapy to make changes in components of function that do not have an impact on the beneficiary's ability to perform age-appropriate tasks is not covered.

Physical therapy must be skilled (it requires the skills, knowledge, and education of a licensed physical therapist). Interventions that could be expected to be provided by another entity (e.g., teacher, registered nurse, licensed occupational therapist, family member or caregiver) would not be considered as a Medicaid cost under this coverage.

Services must be prescribed by a physician/licensed physician's assistant and may be provided on an individual or group basis by a physical therapist or a physical therapy assistant currently licensed by the State of Michigan, or a physical therapy aide who is receiving on-the-job training. The physical therapist must supervise and monitor the assistant's performance with continuous assessment of the beneficiary's progress. On-site supervision of an assistant is not required. An aide performing a physical therapy service must be directly supervised by a physical therapist that is on-site. All documentation by a physical therapy assistant or aide must be reviewed and signed by the appropriately credentialed supervising physical therapist.

## 3.23 SPEECH, HEARING, AND LANGUAGE

### Evaluation

Activities provided by a licensed speech-language pathologist or licensed audiologist to determine the beneficiary's need for services and to recommend a course of treatment. A speech-language pathology assistant may not complete evaluations.

**Therapy**

Diagnostic, screening, preventive, or corrective services provided on an individual or group basis, as appropriate, when referred by a physician (MD, DO).

Therapy must be reasonable, medically necessary and anticipated to result in an improvement and/or elimination of the stated problem within a reasonable amount of time. An example of medically necessary therapy is when the treatment is required due to a recent change in the beneficiary's medical or functional status affecting speech, and the beneficiary would experience a reduction in medical or functional status were the therapy not provided.

## SECTION 17 – ADDITIONAL MENTAL HEALTH SERVICES (B3S)

PIHPs must make certain Medicaid-funded mental health supports and services available, in addition to the Medicaid State Plan Specialty Supports and Services or Habilitation Waiver Services, through the authority of 1915(b)(3) of the Social Security Act (hereafter referred to as B3s). The intent of B3 supports and services is to fund medically necessary supports and services that promote community inclusion and participation, independence, and/or productivity when identified in the individual plan of service as one or more goals developed during person-centered planning.

### 17.3.C. ENHANCED PHARMACY

Enhanced pharmacy items are physician-ordered, nonprescription "medicine chest" items as specified in the individual's plan of service. There must be documented evidence that the item is not available through Medicaid or other insurances, and is the most cost-effective alternative to meet the beneficiary's need.

The following items are covered only for adult beneficiaries living in independent settings (i.e., own home, apartment where deed or lease is signed by the beneficiary):

- Cough, cold, pain, headache, allergy, and/or gastrointestinal distress remedies

- First aid supplies (e.g., band-aids, iodine, rubbing alcohol, cotton swabs, gauze, antiseptic cleansing pads)

The following items are covered for beneficiaries living in independent settings, with family, or in licensed dependent care settings:

- Special oral care products to treat specific oral conditions beyond routine mouth care (e.g., special toothpaste, toothbrushes, anti-plaque rinses, antiseptic mouthwashes)
- Vitamins and minerals
- Special dietary juices and foods that augment, but do not replace, a regular diet
- Thickening agents for safe swallowing when the beneficiary has a diagnosis of dysphagia and either:
- A history of aspiration pneumonia, or
- Documentation that the beneficiary is at risk of insertion of a feeding tube without the thickening agents for safe swallowing.

Coverage excludes:

- Routine cosmetic products (e.g., make-up base, aftershave, mascara, and similar products)

****

*Medicaid Provider Manual*
*BHIDDSS Chapter*
*January 1, 2020, pp 18, 19, 20-22, 133-134*
*Emphasis added*

As such, NLCMH is responsible for providing all of the above services, except as indicated below. This finding is consistent with the policy found in the MPM, as indicated above, as well as the testimony of the Department's witness at the hearing. However, given that some Enhanced Pharmacy items may also be covered under the category of Specialized Medical Equipment and Supplies under the MI Choice Waiver, NLCMH and AAA of NWMI shall revert to the negotiated split of those items from 2018. (See P's Exhibit B). This negotiated arrangement will remain in place until further order of this Tribunal or until successfully renegotiated by the parties. This also assumes that none of the items are covered by Petitioners' health insurance. Both NLCMH and AAA of NWMI can insist that Petitioners provide a denial from Petitioners' health insurance before covering any of these services.

Regarding Environmental Services, given the finding from Issue 3 above (the order of payment is Medicaid State Plan or Medicaid Health Plan, MI Choice Waiver, then CMHSP), the MI Choice Waiver, AAA of NWMI, will be primarily responsible for Petitioners' medically necessary Environmental Services under its Environmental Accessibility Adaptations policy. However, AAA of NWMI did properly deny Petitioners' blanket request for all Environmental Adaptations. Each requested service must be specific so that Respondent AAA of NWMI is able to evaluate the request properly

under policy. Should Petitioners make a specific request for Environmental Accessibility Adaptations to Respondent AAA of NWMI that is denied, Petitioners can then make the same request to CMHSP to see if the adaptation might be covered there. Petitioners, of course, can also appeal any denial of a specific Environmental Accessibility Adaptation. Furthermore, given that AAA of NWMI has already installed air conditioning for Petitioners, AAA of NWMI shall continue to furnish and service that environmental service.

Therefore, based on the evidence presented, Petitioners have proven, by a preponderance of the evidence that NLCMH improperly attempted to terminate all of their services and close their files. NLCMH must provide Petitioners all medically necessary services consistent with this Decision and Order.

As indicated above, AAA of NWMI properly denied Petitioners' requests for blanket services but AAA of NWMI must provide Petitioners all medically necessary services consistent with this Decision and Order.

## DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that:

> **Issue 1**: Enrollment in the MI Choice Waiver does not preclude a beneficiary from simultaneously receiving Medicaid services through a CMHSP.
>
> **Issue 2**: A MI Choice Waiver enrollee is eligible to receive some CMHSP services that could also be provided by the MI Choice Waiver agency.
>
> **Issue 3**: The order of payment for services covered under multiple Medicaid providers is Medicaid (*i.e.,* State Plan or Medicaid Health Plan), MI Choice Waiver, then CMHSP.
>
> **Issue 4**: Speech Therapy, Occupational Therapy, Physical Therapy, Family Counseling (Therapy), Enhanced Pharmacy, and Dietary Services are not covered under the MI Choice Waiver but are covered services for a CMHSP such as NLCMH. Environmental Services are covered services by both CMHSP and MI Choice Waiver.

**IT IS THEREFORE ORDERED** that:

> NLCMH's decision to terminate all of Petitioners' services and close their cases is **REVERSED**.
>
> NLCMH will cover all of Petitioners' medically necessary needs for Speech Therapy, Occupational Therapy, Physical Therapy, Family Counseling, and Dietary Services.

For Enhanced Pharmacy/Specialized Medical Equipment and Supplies, the parties shall revert to the negotiated split of those items from 2018. Both NLCMH and AAA of NWMI can insist that Petitioners provide a denial from Petitioners' health plan before covering any items of Enhanced Pharmacy/Specialized Medical Equipment and Supplies.

AAA of NWMI will be primarily responsible for Petitioners' medically necessary Environmental Services under its Environmental Accessibility Adaptations policy. AAA of NWMI shall continue to service Petitioners' air conditioning.

AAA of NWMI's denial of Petitioners' blanket requests for services is **AFFIRMED**. Petitioners must make specific requests that can be evaluated individually under the Waiver policy.

Petitioners must file new requests for hearing for issues that arose after the requests for hearing in the instant matters were filed.

The parties must certify within 10 days of the receipt of this Decision and Order that they have taken steps to comply with the Decision and Order.

RM/tem

**Robert J. Meade**
Administrative Law Judge

**NOTICE OF APPEAL**: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

**DHHS -Dept Contact**

Belinda Hawks
320 S. Walnut St.
5th Floor
Lansing, MI 48913
MDHHS-BHDDA-Hearing-Notices@michigan.gov

**Counsel for Non-Party MDHHS**

Stephanie M. Service
P.O. Box 30758
Lansing, MI 48909
AG-HEFS-MAHS@michigan.gov

**Petitioners**

[redacted], MI [redacted]

**Counsel for Petitioners**

Craig W. Elhart
329 S. Union
Traverse City, MI 49684
craig@ehlawtc.com

**Authorized Hearing Rep.**

[redacted], MI [redacted]

**Counsel for Respondent NLCMH**

P. David Vinocur
2644 Westward Drive
Traverse City, MI 49685
dvinocur@chartermi.net

**DHHS Department Rep.**

Rosemary Rokita
Northern Lakes CMH
527 Cobbs St
Cadillac, MI 49601
brie.molaison@nlcmh.org

**DHHS-Location Contact**

Rosemary Rokita - 28/45
105 Hall St Suite A
Traverse City, MI 49684
brie.molaison@nlcmh.org

**Counsel for Respondent AAA of NW Michigan**

Leslie A. Dickinson
Foster Swift
1700 E Beltline Ave NE STE 200
Grand Rapids, MI 49525
labdoo@fosterswift.com